IN THE UNITED STATES COURT OF FEDERAL CLAIMS

AMERICAN MANAGEMENT SYSTEMS, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 01-586C
v.	)	(Senior Judge Wiese)
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL, DEFENDANT'S MOTION TO STAY FURTHER PROCEEDINGS, AND DEFENDANT'S MOTION FOR AN ENLARGEMENT OF TIME [1]

Pursuant to Rules 1 and 7(b) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant respectfully requests the Court to amend its August 30, 2002, opinion to include the express finding prescribed by 28 U.S.C. § 1292(d)(2), and, thus, formally certify the order for interlocutory appeal to the United States Court of Appeals for the Federal Circuit. Additionally, we respectfully request the Court to stay further proceedings in this case pending the conclusion of any interlocutory appeal. In support of our motions, we rely upon the following memorandum of law.

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[1] Pursuant to Appendix A, RCFC, the parties' joint preliminary status report is due to be filed on November 4, 2002. Should the Court deny defendant's motion to stay further proceedings, defendant respectfully requests the Court to grant the parties an enlargement of time of 14 days from the date of the Court's order denying our motion within which to file the parties' joint preliminary status report. Defendant's counsel has discussed these matters with plaintiff's counsel, and plaintiff's counsel has indicated that plaintiff opposes our motion to certify for interlocutory appeal and motion to stay proceedings. Plaintiff's counsel did not indicate whether plaintiff will oppose the requested enlargement of time.

DEFENDANT'S MEMORANDUM

I. Introduction

This case involves a contract between the Federal Retirement Thrift Investment Board ("Board") and plaintiff American Management Systems, Inc. ("AMS") to design and develop an automated record keeping system for the Thrift Savings Plan ("TSP"). The TSP is a defined contribution retirement savings plan that provides a means for Federal employees to accumulate capital for retirement. See Federal Employees' Retirement System Act of 1986 ("FERSA"), Pub. L. No. 99-335, Title I, sec. 101(a), 103 Stat. 514 (codified as amended at 5 U.S.C., chapter 84, subchapter III). On November 27, 2001, we filed a motion to dismiss based upon the so-called "non-appropriated funds" doctrine prescribed by 28 U.S.C. § 2517(a). We argued that the Court lacks subject matter jurisdiction because the TSP contract was not financed from general Federal revenues, but rather was funded out of private monies (i.e., compensation of Federal employees) placed in the Thrift Savings Fund.

The Court denied our motion by decision dated August 30, 2002. American Management Systems, Inc. v. United States, 53 Fed. Cl. 525 (2002). Relying principally upon 5 U.S.C. § 8437(c), the Court stated that, "[b]ecause the government-sourced monies in the Fund originate in an appropriation that specifically earmarks their use for Thrift Board expenses, it

cannot be successfully argued that the Thrift Board is drawing on private funds." 53 Fed. Cl. at 527. After reviewing other portions of FERSA, the Court concluded that nothing else in the statute indicated that the sums in the Fund "involve other than an appropriation of public funds." 53 Fed. Cl. at 528. The Court thus accepted jurisdiction over the case, holding that the "Board is a governmental agency whose administrative expenses are payable out of public funds made available through a congressional appropriation." 53 Fed. Cl. at 529.

As explained below, interlocutory review is warranted because there is a substantial ground for difference of opinion whether Congress intended to separate the Board from general Federal revenues and, thus, divest this Court of Tucker Act jurisdiction over the case. As a matter affecting this Court's jurisdiction, the early resolution of this issue will avoid expenses, waste, and hardship to the parties, and will materially advance the ultimate disposition of this case.

Moreover, immediate appeal is justified because this case presents not simply an issue of first impression, but rather a matter of great importance to the vast number of present and former Federal civilian employees and uniformed service members who have contributed their retirement savings to the Thrift Savings Plan. Congress established the TSP, a voluntary, tax-deferred savings program similar to private-sector "Section

401(k)" plans, to encourage Federal employees to save for their retirement. See H.R. Conf. Rep. No. 99-606, at 134 (1986), reprinted in 1986 U.S.C.C.A.N 1508, 1517 ("These popular tax-deferred savings plans should be as available to Federal employees as they are to private sector employees."). The characterization of the Thrift Savings Fund as not being comprised of private funds could cause confusion and concern to the approximately 3.6 million participants and beneficiaries who have maintained assets in excess of $100 billion in the Fund based upon the understanding that these assets belong to them, and may be invested by them as a means to accumulate capital for their retirement years. This novel and significant issue calls for appellate review at the earliest opportunity.

II. Defendant's Proposed Controlling Question

Section 1292(d)(2) provides for the appeal of "orders," not issues. United States v. Connolly, 716 F.2d 882, 885 (Fed. Cir. 1983). Nevertheless, identification of the controlling issue by the trial court upon which interlocutory appeal will be sought can be of assistance to the appellate court. See, e.g., Isra Fruit Ltd. v. Agrexco Agricultural Export Co., 804 F.2d 24, 25 (2d Cir. 1986) ("it is helpful if the district judge frames the controlling question(s) that the judge believes is presented by the order being certified"); American Telephone & Telegraph Co. ("AT&T") v. United States, 33 Fed. Cl. 540, 540 (1995)

(identifying controlling questions for interlocutory appeal). Accordingly, we propose the following controlling question for interlocutory appeal:

> Whether, pursuant to the "non-appropriated funds" doctrine prescribed by 28 U.S.C. § 2517(a), the United States Court of Federal Claims lacks subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to entertain claims based upon activities of the Federal Retirement Thrift Investment Board.

III. The Standard For Certification Of Interlocutory Appeal

Certification of an otherwise interlocutory decision is appropriate when the Court finds "that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(d)(2). See also Aleut Tribe v. United States, 702 F.2d 1015, 1019 (Fed. Cir. 1983). This Court has identified the following three factors that must be present to certify an interlocutory appeal:

> (1) a controlling question of law; as to which there is
>
> (2) substantial ground for difference of opinion; and that
>
> (3) possible material advancement of the ultimate termination of the litigation will occur if the certification order is issued.

See Coast Federal Bank, FSB v. United States, 49 Fed. Cl. 11, 13 (2001); Favell v. United States, 22 Cl. Ct. 132, 143 (1990).

This three-prong test is designed to assess the relative burdens and benefits attendant to the allowance of an immediate appeal. AT&T, 33 Fed. Cl. at 541. Thus, these factors should be viewed together as a "unitary requirement" so that the Court may consider the probable advantages and disadvantages of certification against proceeding with a full disposition of the case. 19 J. Moore, Moore's Federal Practice § 203.31[1], at 203-86 (3d ed. 1999).

Further, the requirement should be read broadly. "The difficulty and general importance of the question presented, the probability of reversal, the significance of the gains from reversal, and the hardship on the parties in their particular circumstances, could all be considered." 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 3930, at 442 (2d 1996). "[A] narrow approach to the 'controlling question' and 'materially advance' elements can defeat this desirable level of flexibility." Id.

As demonstrated below, whether the criteria identified above are viewed independently or collectively, an immediate appeal of the Court's August 30, 2002, opinion is clearly appropriate.

IV. The Standards For Certification Of An Interlocutory Appeal Are Satisfied In This Case

A. A Controlling Question Of Law Exists

As a matter affecting this Court's jurisdiction, the application of the non-appropriated doctrine to this case is a

controlling question of law. "[I]t is clear that a question of law is 'controlling' if reversal of the [trial] court's order would terminate the action." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir. 1990); see 19 J. Moore, supra, § 203.31[2], at 203-87 ("Of course, if resolution of the question being challenged on appeal will terminate the action in the [trial] court, it is clearly controlling."); 16 Wright & Miller § 3930, at 423-24 ("[A] question is 'controlling' if its incorrect disposition would require reversal of a final judgment . . . for a dismissal that might have been ordered without the ensuing [trial] court proceedings.").

Our jurisdictional arguments apply to all claims for relief presented in plaintiff's complaint. If this Court's holding that plaintiff may assert a contract claim in this Court is incorrect, the Court lacks jurisdiction to entertain the entire case. Absent jurisdiction, this case will terminate in this forum. Thus, the jurisdictional ruling in the Court's August 30, 2002 decision plainly involves a "controlling question of law." See, e.g., Vereda, LTDA v. United States, 46 Fed. Cl. 569, 570 (2000) ("If the Federal Circuit finds that this Court does not have jurisdiction to hear it, the entire lawsuit will be dismissed.").

B. Substantial Grounds For A Difference Of Opinion Exist

This case also satisfies section 1292(d)(2)'s requirement of a "substantial ground for difference of opinion."

The "substantial ground" prong of section 1292(d)(2) is satisfied where courts have disagreed on the disputed issue or, in a case of first impression, where the applicable law is novel, uncertain, or complex. See, e.g., Coast Federal, 49 Fed. Cl. at 14 ("substantial ground" requirement met where courts have disagreed or where it is "impossible to tell at present whether other courts will disagree").[2] Thus, this Court has certified questions for interlocutory review where, for example, the "possibility of a different outcome on appeal is not remote" or the "extent and depth" of the parties' dispute demonstrates "room for disagreement." AT&T, 33 Fed. Cl. at 540; Coast Federal, 49 Fed. Cl. at 14.

Moreover, "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case." 16 Wright & Miller § 3930, at 422. "If proceedings that threaten to endure for several years depend on an initial question of jurisdiction, . . . certification may be justified at a relatively low threshold of doubt." Id.

As noted above, the Court framed the jurisdictional issue in

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[2] See also Vereda, 46 Fed. Cl. at 570-71 (finding substantial ground for difference of opinion where legal issues "border on the metaphysical"); McDonnell Douglas Corp. v. United States, 27 Fed. Cl. 204, 205 (1992) ("substantial ground" prong requires "an absence of controlling judicial authority on an issue.").

this case as whether the sums in the Thrift Savings Fund constitute an "appropriation of public funds." A substantial ground for difference of opinion on this issue is readily apparent for several salient reasons.

First, as a threshold matter, the Federal Circuit may conclude that application of the non-appropriated funds doctrine in this case does not turn solely upon whether the Board operates from an appropriation of public as opposed to private funds. Rather, the court may hold that, regardless of whether the Fund is comprised of public monies, Tucker Act jurisdiction is lacking because those funds are nevertheless sufficiently "isolated from general fund revenues" so as to render the Board a non-appropriated funds entity. See Furash & Co. v. United States, 252 F.3d 1336, 1340 (Fed. Cir. 2001) ("what matters is whether the agency's authorizing legislation makes clear that Congress intends for the agency--or the particular activity that gave rise to the dispute in question--to be separated from general federal revenues."). Similar to Furash, FERSA provides for the Board's administrative expenses to be paid from the special, segregated Thrift Savings Fund financed by employee and employer contributions; there is no statutory authority to spend money from, or to have excess funds revert to, general Federal Treasury accounts.

The chance that the Federal Circuit may so conclude is not a

remote possibility. Indeed, at the hearing held on defendant's motion to dismiss, the Court consistently characterized the non-appropriated funds doctrine as an elusive legal matter, and indicated that applying it to the Board's activities in this case was not a simple or readily-apparent undertaking.[3] The Court even candidly suggested that a different outcome on appeal was possible. See Tr. at 67 (to plaintiff's counsel: "You may appreciate the fact we may both be wrong."). Thus, because the jurisdictional issue presented in this case "could be answered differently," AT&T, 33 Fed. Cl. at 540, certification for interlocutory review is warranted.

Second, even assuming the dispositive issue in this case is whether the Thrift Savings Fund is comprised of public rather than private funds, this issue also presents, without question, a substantial ground for difference of opinion. In fact, numerous sources, ranging from the Board's enabling legislation to its legislative history to various secondary materials, consistently characterize the Fund as being comprised of private monies.

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[3] See, e.g., Transcript of Hearing ("Tr."), dated August 27, 2002, at 18 ("The truth of the matter is, it eludes me all the time -- the truth of the Doctrine."); at 66 ("If I'm wrong in that regard, time will tell . . . [but] I don't believe [defendant's position] or understand it. I don't know which comes first, but I guess it's the lack of understanding that comes first."); at 65 ("I've tried to catch up with you on this problem and I told [plaintiff's counsel] that this non-appropriated funds doctrine is, to me, a very elusive one, at least as it's played out in the case law.").

For example, FERSA provides that, rather than being deposited in the general fund of the Treasury, all contributions to the Fund are immediately credited to a participant's account, are made "for the benefit of such employee," and are held "in trust for such employee." 5 U.S.C. §§ 8432(c)(1)(A), 8432(f), 8437(g). More fundamentally, the statute further provides that "any contribution to, and distribution from, the Thrift Savings Fund shall be treated in the same manner as contributions to or distributions from" a trust qualified under section 401(a) of the Internal Revenue Code, which is the provision that governs income tax treatment for employee "deferred compensation" plans. 5 U.S.C. § 8440(a)(1)-(2); 26 U.S.C. § 7701(j).

These provisions clearly demonstrate that Congress did not intend to have contributions to the Fund construed as public funds but, as rather, private monies in the form of compensation paid to Federal employees in exchange for their services. Indeed, since public funds are not subject to taxation, had Congress regarded contributions to and distributions from the Fund as appropriated funds of the United States, there would have been no need to enact the elaborate and detailed provisions establishing the Fund as a tax-exempt Section 401 trust.[4]

[4] Because the Fund is treated the same as a Section 401 trust, the income tax otherwise payable on the portion of the employee's compensation contributed to the Fund (and the net earnings on the contributions) is deferred until such time as the employee actually receives distributions from the trust. See

Similarly, FERSA's legislative history confirms that the Fund is not public money. The conference report states:

> Unlike a defined benefit plan where an employer essentially promises a certain benefit, a thrift plan is an employee savings plan. In other words, the employee owns the money. The money, in essence, is held in trust for the employee and managed and invested on the employee's behalf until the employee is eligible to receive it. This arrangement confers upon the employee property and other legal rights to the contributions and their earnings. Whether the money is invested in Government or private securities is immaterial with respect to employee ownership. The employee owns it, and it cannot be tampered with by any entity including Congress.

H.R. Conf. Rep. No. 99-606, at 137 (1986), reprinted in 1986 U.S. Code Cong. and Adm. News, pp. 1508, 1520 (emphasis added). In fact, relying upon these provisions, the General Accounting Office ("GAO") has consistently opined that the Fund's account balances "should not be considered government amounts." See, e.g., GAO Opinion B-227344 (May 29, 1987).[5]

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id.; 26 U.S.C. §§ 401(a), 402(a), and 501(a).

[5] See also GAO Report No. GAO-01-199SP, Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions, dated January 2001, at p. 7:

> There are cases – such as the federal employees' Thrift Savings Fund – in which the federal government holds nonfederal monies in trust as a custodian on behalf of some entity outside the government. Since the government makes no decisions about the amount of these deposits or how they are spent, they are not considered to be federal trust funds.

Lastly, other materials cited by the Court regarding the Board's budget process likewise demonstrate that the sums in the Fund are not public funds. For example, although the Court observed that the Board's expenses are listed in the President's budget beneath the title "Federal Funds," 53 Fed. Cl. at 528-29, other more substantive portions of the budget expressly distinguish between the concepts of "Federal Funds" and "Deposit Funds" (identifying the latter as amounts held by the Government "as a custodian on behalf of some entity outside the Government"); describe the Thrift Savings Fund as the largest "deposit fund" in the Government; and state that the assets in the Fund are "property of the employee held by the Government in a fiduciary capacity . . . ." See Budget of the United States Government, Fiscal Year 2003, Analytical Perspectives, at pp. 351-52, 385, 432.[6]

In sum, although the non-appropriated funds doctrine may be, as the Court noted, an elusive legal matter, the import of these

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> Rather, they are considered to be nonbudgetary and are excluded from the federal budget. . . .

[6] The Treasury Department also defines a "deposit fund" as an "account to record monies that do not belong to the Federal Government." Treasury Financial Manual, Vol. 1, Part II, Chapter 1500, at 4. Moreover, Treasury's annual financial statements of Government operations exclude the Fund (and the Board) because "the employees own its assets." See 2001 Financial Report of the United States Government, Department of the Treasury, at 103 (attached).

materials simply cannot be ignored. However the controlling issue is defined, a substantial ground for difference of opinion undeniably exists with respect to the jurisdictional issue in this case. This novel and significant issue thus calls for appellate review at the earliest opportunity.

C. Interlocutory Appeal Will Materially Advance The Ultimate Termination Of The Litigation

Certification will also result in the "possible material advancement of the ultimate termination of the litigation."

"The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." 16 Wright & Miller § 3930, at 432. In cases where, as here, the controlling issue in dispute is jurisdictional, this requirement is met because "waste and hardship to the parties" could ensue by reconsideration of jurisdiction in the normal course after final judgment. Vereda, 46 Fed. Cl. at 570-71.

If this case were to proceed without a interlocutory ruling by the Federal Circuit, the parties would incur significant expenses during discovery and litigation. The time, trouble, and expense of litigation, coupled with the potential waste of vital judicial resources, will be saved by certification if the Federal Circuit reverses this Court's August 30, 2002 decision. Even in the event of affirmance, "much can be gained by having the court of appeals address the controlling question[] in the case on an

interlocutory basis rather than at the conclusion of what could otherwise prove to be a much protracted lawsuit." AT&T, 33 Fed. Cl. at 541. See also Vereda, 46 Fed. Cl. at 571 (certifying disputed jurisdictional issue for immediate appeal because affirmance by Federal Circuit "will permit all those involved to proceed to trial undeterred by this uncertainty" and a reversal "would terminate the sole claim remaining and avoid a costly trial.").

For these reasons, we respectfully request that the Court grant our motion to certify for interlocutory appeal and amend its August 30, 2002 decision to include the express certification language contained in 28 U.S.C. § 1292(d)(2).

V. This Court Should Stay Further Proceedings In This Case Pending The Conclusion Of Any Interlocutory Appeal

We further request that, during the pendency of any interlocutory appeal, the Court stay further proceedings, including discovery, in this case.

The power to stay proceedings derives from "'the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.'" New York Power Authority v. United States, 42 Fed. Cl. 795, 799 (1999) (quoting Landis v. North Am. Co., 299 U.S. 248, 254 (1936); Cherokee Nation of Oklahoma v. United States, 124 F.3d 1413, 1416 (Fed. Cir. 1997)) (internal citation omitted). This power includes the power to stay

proceedings to await the disposition of matters relevant to the case at hand that are being litigated and evaluated in another proceeding or forum. Landis, 299 U.S. at 254; Ethicon, Inc. v. Quigg, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988); Caparco v. United States, 28 Fed. Cl. 736, 737-38 (1993).

Although proceedings before the trial court are not automatically stayed during the pendency of a section 1292(d)(2) interlocutory appeal, proceedings should be stayed where the result of the immediate appeal could terminate further proceedings in the trial court. See Coast Federal, 49 Fed. Cl. at 15 ("In deciding whether to stay proceedings [pending interlocutory appeal], the court considers whether 'the . . . order appealed from, if vacated, would vitiate the [ ] proceedings' below.") (quoting United States v. Local 560 (I.B.T.), 694 F. Supp. 1158, 1186 (D.N.J. 1988)).[7]

Moreover, a stay is particularly appropriate in peculiar circumstances of this case. If proceedings were to continue during the pendency of interlocutory review, the Board would

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[7] See also Vereda, 46 Fed. Cl. at 570-71; Bryant v. Apple South, Inc., 25 F. Supp. 2d 1372, 1383 (M.D. Ga. 1998); In re American Honda Motor Co., Inc., Dealerships Relations Litigation, 958 F. Supp. 1045, 1059 (D. Md. 1997); Maestri v. Westlake Excavating Co., 894 F. Supp. 573, 579 (N.D.N.Y. 1995); Magne-systems, Inc. v. Nikken, Inc., Civ. No. 94-0715-ABC(EEX), 1994 WL 808421, at *7 (C.D. Cal. Aug. 8, 1994); Wieboldt Stores, Inc. v. Schottenstein Stores Corp., Civ. No. 87-C-8111, 1989 WL 51068, at *2 (N.D. Ill. May 5, 1989); O'Brien v. Avco Corp., 309 F. Supp. 703, 705 (S.D.N.Y. 1969).

incur expenses that must be paid from the Fund and, by extension, out of the retirement savings of the participants and beneficiaries in the Thrift Savings Plan. This expense would be needlessly and irreparably incurred if the court of appeals ultimately concludes the Tucker Act jurisdiction is lacking in this case. A stay of proceedings during the pendency of interlocutory review will thus avoid waste and expense in this regard.

In light of the threshold jurisdictional question at issue in this case, a suspension of all proceedings in this case pending the conclusion of the interlocutory appeal is the most prudent course of litigation and will lead to the most efficient utilization of the resources of both the Court and the parties. Accordingly, we respectfully request that the Court suspend proceedings in this action pending the issuance of a final, non-appealable order in the interlocutory appeal of this Court's August 30, 2002 decision.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant defendant's motion to certify for interlocutory appeal and amend its opinion dated August 30, 2002, to include the following express finding:

> The Court finds that controlling questions of law are involved with respect to which there are substantial grounds for difference of opinion, and an immediate appeal from the

order may materially advance the ultimate termination of the litigation.

We further respectfully request that the Court suspend all proceedings in this action pending the issuance of a final, non-appealable order in the interlocutory appeal of this Court's August 30, 2002 decision.

Respectfully submitted,

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November 1, 2002

A P P E N D I X

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify under penalty of perjury that on this __th day of November, 2002, I caused to be sent by United States mail (postage prepaid) copies of "DEFENDANT'S MOTION TO CERTIFY FOR INTERLOCUTORY APPEAL, DEFENDANT'S MOTION TO STAY FURTHER PROCEEDINGS, AND DEFENDANT'S MOTION FOR AN ENLARGEMENT OF TIME" as follows:

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